Supreme Court of the United States.

No. 67. December Term, 1867.

BRODERICK'S EXECUTOR, Plaintiff in Error,

VERSUS

McGraw's Administrator.

BRIEF FOR PLAINTIFF IN ERROR.

J. M. CARLISLE,
FOR THE PLAINTIFF IN ERROR.

Gibson & Simmons, Printers & Stereotypers, Washington, D.C.

Supreme Court of the United States.

No. 67.

DECEMBER TERM, 1867.

BRODERICK'S EXECUTOR, PLAINTIFF IN ERROR,

vs.

McGRAW'S ADMINISTRATOR.

This is a writ of error, under the twenty-fifth section of the judiciary act, to reverse a judgment of the supreme court of the State of California.

The case was thus:

Broderick, in his lifetime, to wit: On the 1st July, 1858, at the city of New York, made his promissory note, there dated, for $10,500, payable at the Chemical Bank in that city, ten months after date, to the order of A. Welch. On this note a payment of $3,500 was made before the note matured, as appears by an endorsement signed by the payee; and afterwards the note was endorsed by the payee to McGraw. (Rec., p. 3, fol. 4.)

Broderick died some time prior to 20th October, 1860, on which day letters testamentary were granted on his estate. (Rec., p. 4, fol. 5.)

The debt due McGraw on this note was duly proved and allowed by the proper probate court at San Francisco against the estate of Broderick.

McGraw demanded of the executor payment in the gold coin of the United States, and refused payment in any other currency. And thereupon, on the 4th January, 1864, McGraw filed his petition in the said probate court, to compel such payment in United States gold coin. In this petition he states and shows that there were then assets sufficient to pay the debts in gold coin.

On the 8th March following (Rec., p. 10, fol. 14) the executor filed his answer, in which he states, among other things, that he had caused the whole amount of principal

and interest due on the note to be tendered at the place of payment, to wit: the Chemical Bank in the city of New York, in the said year 1864, in "lawful money of the United States;" which sum, of such lawful money, still remains in the said bank, subject to McGraw's order, but McGraw refused the same.

The probate court, upon these proceedings, ordered and decreed that the executor pay the debt "in *United States gold coin.*" (Rec., p. 14, fol. 20.)

"To which order and judgment directing the payment of said claim of said McGraw, *in so far as the same directs the payment thereof to be made in United States gold coin*, the executor excepted," (Rec., p. 15, fol. 21,) and thereupon appealed to the supreme court of the State of California, and on such appeal the judgment of the probate court was affirmed. (Rec., p. 18.)

On the return of this writ of error to reverse that judgment at a former term of this court, the question of the jurisdiction was fully argued and considered by the court upon a motion to dismiss; which motion was overruled, and the jurisdiction affirmed, so that there is no question remaining on that head.

THE POINTS.

The probate court, and after it the supreme court of California, assumed to adjudge that the debt, so as aforesaid due by Broderick in his lifetime, and which was proved and allowed against his executor, should be paid and discharged only in the gold coin of the United States.

But before the initiation of these proceedings in the probate court the act of Congress, entitled "An act to authorize the issue of United States notes," &c., had been passed and approved, to wit, on the 25th February, 1862, which act was thenceforth, hitherto, and still is, in force. And by this act it is expressly declared that the Treasury notes, thereby authorized, (12 Stat. at Large, 345,) "shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest on the national debt," &c., &c.

It is plain, therefore, that if this be a constitutional act of Congress, the judgment which denied the right of the plaintiff in error to pay this private debt otherwise than in the gold coin of the United States is against law and must be reversed, for the law expressly authorized the payment and discharge in other money than gold coin of the United States, to wit, in the legal-tender notes authorized by the statute in question.

For the language of the statute, and its manifest intent and policy, extend to all private debts without exception, and this is a private debt.

I.

Is the statute, commonly called "the legal-tender act" constitutional, in so far as it purports to make the notes thereby authorized lawful money and a legal tender in payment of all debts, &c., &c.?

It will be maintained that this act was within the powers of Congress conferred by article 1, sec. 8, sub. 18 of Constitution.

It is settled, that in the choice of means to carry into effect its powers expressly granted, Congress is not restricted to those which are absolutely essential, but may select those which are useful or conducive to the end, or calculated to effect the object. And Congress is the sole judge of the degree of necessity or expediency.

McCullock *vs.* State of Maryland, 4 Wheat, 316.
United States *vs.* Fisher, 2 Cranch, 358.

Nor is it necessary even that the power to be exercised should be necessary to the execution of any single one of the powers expressly granted. It may result from the aggregate powers of the Government. Such is the power to sue and make contracts, the power to acquire territory, &c.

The power to issue notes or bills of credit, and make them a legal tender in payment of debts, was a well-known expedient of Governments in time of emergency.

It was a common practice of the American colonies before the Revolution.

See Craig *vs.* State of Missouri, 4 Pet., 410.
Briscoe *vs.* Bank of Commonwealth of Kentucky, 11 Pet., 257, and 13 Howard, 12.

The Continental Congress also issued bills of credit, and recommended that the States should make them a legal tender, which some of them did.

So, in the wars of the French revolution, the assignats were made a legal-tender by law.

In England, during the long wars that followed the French revolution, specie payments were suspended by the Bank of England by authority of law, and so remained for over twenty years, and the notes of that bank were made in effect a legal tender, and speculating in coin forbidden by law.

It is thus seen, that long protracted and expensive wars could not be conducted by Governments in modern times on

cash principles, and have often required the issue of legal-tender bills of credit, as a means of conducting them successfully. This must surely then be considered an appropriate means to that end.

In the exercise of the powers expressly given, to pay the debts of the Government, declare war, support armies and navies, and suppress insurrection, it was necessary to borrow money on the credit of the United States, and to expend it at the rate of $1,600,000,000 a year.

Nobody can doubt that money could be more readily borrowed, and with less loss to the Government, by making the evidence of the loan take the shape of Treasury notes, receivable in payment of taxes, and available in payment of private debts. But there was a necessary limit to the power of borrowing specie, even by this expedient. All the specie in the country that could be spared from necessary business operations would not suffice for the wants of the Government.

It became necessary to procure supplies by the immediate use of these legal tenders. It cannot be doubted that the legal-tender feature saved the Government, in the cost of supplies, untold millions, if it did not avert bankruptcy itself. It may be considered not only conducive, but absolutely essential to the end of preserving the authority and existence of the Government.

There is nothing in the Constitution to conflict with the power claimed. The clause authorizing the emission of bills on the credit of the United States was struck out of the original draught of the Constitution. But some advocated its suppression because the power was supposed to be included in that of borrowing money; others, because they did not wish to confer it expressly, while they were unwilling to tie the hands of Government by prohibiting it. (Madison Papers, Vol. 3, p. 1343.) So that it cannot be said that the aggregate sentiment of the framers of the instrument was against the exercise of the power when necessary.

In practice, the construction of the Constitution has been settled the other way. Treasury notes, which are nothing but bills of credit, have been issued repeatedly during a period of fifty years, without objection, the first issue having been approved by Mr. Madison himself. (See Acts of Feb. 25, 1813; March 4, 1814; Dec. 26, 1814; Oct. 12, 1837; Jan. 31, 1842; Aug. 31, 1842; July 22, 1846; Jan. 28, 1847; Dec. 22, 1857, &c.)

Why may not these notes be made a legal tender, if this be a proper or necessary means of carrying other powers into effect? There is no express power in the Constitution to make coin a legal tender. Yet Congress has declared

gold and silver, of domestic and foreign coinage, a legal tender, and has, from time to time, changed and debased the coinage, and still declared it a legal tender, and have further declared copper a legal tender, to a limited extent.

It has been decided that Treasury notes may be made a legal tender in payment of debts to the United States.

Thorndike *vs.* United States, 2 Mason, 1, 18.

It has been decided that Congress may, under the power to borrow money, declare United States stocks and securities exempt from taxation, in order to add to their value.

People *vs.* Tax Commissioners, 2 Black, 620.

There is no reason why, for the same object, the Treasury notes may not be made legal tenders.

The prohibition in the Constitution clearly applies to the States alone. While certain things are forbidden to both Congress and the States, this is forbidden to the latter only.

It is unnecessary, however, to discuss this question at greater length, as it is fully treated in numerous decisions. (See the cases of The Metropolitan Bank *vs.* Van Dyck, and Meyer *vs.* Roosevelt, 13 Smith, 400; Hintrager *vs.* Bates, 18 Iowa Rep., 174; Lick *vs.* Faulkner, 25 California Rep., 404. See, also: Schollenberger *vs.* Brenton, 3 Am. Law Reg., N. S., 591; Schoenberger *vs.* Watts, 1 *Id*, 553; Wambold *vs.* Schlecting, 16 Iowa Rep., 243.)

It will be observed that in the case of Lick *vs.* Faulkner, above cited, the same supreme court of California, to whose judgment the present writ of error goes, determined the legal-tender act to be constitutional. At the date of the judgment on the case at bar, that decision had not been pronounced, but was under advisement. (McGraw *vs.* McGlynn, 26 Cal., 420.) And this case was decided without regard to that question, and solely upon the provisions of the following statute of that State.

"*In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person.*"

Statutes of California 1863, p. 687.

Assuming now the constitutionality of the legal-tender act, we are to show:

II.

That the statute of California, above quoted, is in conflict with that act, and is unconstitutional and void, so far as it purports to authorize and support the judgment now sought to be reversed.

The contrary is held by the supreme court of California, in the opinion pronounced in the case at bar, (26 Cal., 421,) which proceeds upon the *concessum* that the "legal-tender act" is constitutional, but attempts first to reconcile the California statute with it, and then to bring the case within the purview of that statute.

The matter is thus stated by the supreme court of California:

"This answer does not disclose what particular kind of money—that is, whether gold coin or United States Treasury notes—was tendered; and as gold coin of the United States and United States Treasury notes were both, at the time, lawful money of the United States, we are left in ignorance by the answer, as to which of these kinds of money was tendered; and unless either kind would have constituted a valid tender in the *payment of the debt due*, we must hold the plea of tender insufficient." (Per cur., Currey, J., 26 Cal., 428.)

It is here assumed, in terms, that notwithstanding the comprehensive language of the act of Congress, there may be *debts* other than those specially and expressly excepted from its operation by the act of Congress itself, for the payment of which the "*legal-tender* notes" are *not* a legal tender, and as to which they are *not lawful money* to all intents and purposes. And this assumption made, (without any observation upon the language or intent and policy of the act,) the court proceeds to inquire whether the particular debt in the case at bar is of this privileged class.

With deference it is submitted, that here is a plain *petitio principii*. The very matter of inquiry, upon which the whole case depends, is whether the act of Congress has excepted from its operation such debts as this.

Now we have seen that the language of the act is broad and comprehensive. It makes these notes "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest on the public debt." If, therefore, the act be constitutional, (as is here assumed,) and the demand for which the judgment below was rendered be *a debt* within the meaning of the act, (not being for duties on imports, or interest on the public debt,) it follows that *no* statute of California

could except such debt from the operation of the statute, or authorize the judgment here in question.

Was it a *debt* within the meaning of the act of Congress?

It is claimed as a private debt merely. By the record it appears, *modo et forma*, a *debt*. The question made in the Oregon case, standing for judgment at this term, as to the supposed distinction between a *debt* and a *tax* due, does not here arise. The plaintiff below was a simple contract creditor of Broderick, in his lifetime, on an ordinary promissory note. He came into the probate court in the simple character of a creditor. It was precisely because a *debt* was due to him, and for no other reason, and on no other pretence of right, that he had any standing in that court to intermeddle in the matter of Broderick's estate. He sued for a *debt*, and the judgment could only be for the recovery of a *debt*—a mere private debt, on simple contract.

But it is answered, the statute of California makes a distinction among debts, and specially favors and protects *fiduciary* debts.

To this it is a conclusive reply, that the act of Congress makes no such distinction. It does not except from its operation debts contracted in a fiduciary character, or any other debts, public or private, save only duties on imports and interest on the public debt. A debt is none the less a debt because the obligation arose upon a breach of trust, or because the debtor may be pursued, in equity, as trustee as well as debtor. Whatever else he may be in respect of the particular transaction which makes him a debtor, he is always a debtor, and his obligation a debt. His creditor is still a creditor merely, entitled only to be paid his debt as other debts are paid, whatever special remedies he may have to that end. The policy and intent of the law are as clear and comprehensive as its language, and will admit of no such distinction.

If, therefore, this were a fiduciary debt, within the meaning of the California statutes, it nevertheless was a debt within the meaning of the act of Congress also; and the judgment that it be paid only in gold coin, denying to the plaintiff in error the right to pay the debt in the legal-tender notes of the United States, must be reversed, the California statute notwithstanding. But, finally, it seems abundantly clear that the debt in question was not within the words or intent of that statute. The language is:

"And in an action against any person for the *recovery of money received* by such person *in a fiduciary capacity, or to the use of another*, judgment for the plaintiff, whether the same

be by default, or after verdict, may be made payable in the same kind of money or currency *so received* by such person."

The court below thus argues, to bring the case within the statute:

"The money collected by the executor upon the sale of the property of the estate of the testator was received and held by him in a fiduciary capacity, for the use of the creditors of the estate and others interested therein as beneficiaries under the will, and it was his duty to retain in his hands the money thus received until it could be applied and distributed in the order and mode provided by law." (Page 429.) And again:

"The proceeding instituted by the plaintiff, as a creditor of the estate of the deceased, against the executor, was in the nature of an action for the recovery of the money which he had in his hands, in a fiduciary capacity, and to which the plaintiff was entitled to the extent of his demand." Page 432.)

But, is it true, in the sense of the statute, or in any other just sense, that the assets of Broderick's estate in the hands of his executor were subject to be recovered in an action by this creditor, as having been received in a fiduciary character for him, or for his use? Could he maintain replevin or detinue for any of the chattels specifically received by the executor, and remaining in his hands? Could he maintain an action for money had and received to his use? As to him, (the creditor,) was not the executor simply the representative of the deceased debtor, occupying the ordinary relation of the debtor at law, to his creditor? Nothing in the California probate act seems to be at all peculiar touching these legal relations. The executor is bound to pay *the debts* of the testator, so far as he has assets. These debts do not cease to be debts because *he*, and not the testator personally, is to pay them. All that the creditors can demand of him is to *pay the debts*, as the testator was bound to pay them when living.

If it be suggested that the supreme court of California has, in this very case, given an authoritative construction to the statute of that State, it may be replied that there is no question of construction in the matter. The *language* of the statute is perfectly plain and unambiguous. The point determined is one which concerns the general law, not the interpretation of the statute, to wit: The proposition that an executor holds the assets of his testator as trustee for each creditor, who may have the same remedies against him as if he were the agent or bailee or special trustee by express con-

vention, of such creditor. And this is asserted, not upon the construction of the statute, but upon the authority of a common law case, reported in 4 T. R. 429, (the only one cited by the court,) which, with entire deference be it said, appears to be authority for nothing more than that the assets in the hands of the executor are not liable for his private debt.

But, finally, if the statute be authoritatively construed to mean what is repugnant to the act of Congress, then it is authoritatively shown to be void to the extent of such repugnancy.

It is submitted, upon the whole matter, that the judgment be reversed.

J. M. CARLISLE,
For the Plaintiff in Error.

Supreme Court of the United States.

No. 67. December Term, 1867.

JOHN A. McGLYNN,

EXECUTOR OF DAVID C. BRODERICK, DECEASED.

VERSUS

HENRY S. McGRAW'S ADMINISTRATRIX.

WRIT OF ERROR TO THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA.

BRIEF FOR DEFENDANT IN ERROR.

J. A. WILLS,
FOR THE DEFENDANT IN ERROR.

Gibbons & Wentworth, Publishers & Stereotypers, Washington, D.C.

Supreme Court of the United States.

No. 67.

DECEMBER TERM, 1867.

JOHN A. McGLYNN, EXECUTOR OF DAVID C. BRODERICK, DECEASED,

vs.

HENRY S. MAGRAW'S ADMINISTRATRIX.

WRIT OF ERROR TO THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA.

STATEMENT OF THE CASE.

This is a writ of error brought by McGlynn, executor of David C. Broderick, deceased, against Henry S. Magraw, under the 25th section of the judiciary act of 1789, to review the judgment of the supreme court of California, which affirmed the judgment of the probate court of the city and county of San Francisco, directing him, as executor, to pay the debt due Magraw in gold coin.

The facts of the case, so far as they are necessary for understanding the question attempted to be raised on this record, are sufficiently stated in the decree of the probate court, which will be found in the printed Record, p. 12–15, and in the judgment of the supreme court of California, *ib.*, p. 18, and need not be repeated here.

The facts of the case, the arguments of counsel, and the opinion of that court, will also be found reported in Magraw *vs.* McGlynn, (26 Cal. Rep., 420–435,) decided at the October term, 1864, to which reference is here made.

In the probate court and in the supreme court of California, three questions were made: 1. As to the authority of the probate court to compel the executor, in the settlement of his account, to set forth and show *the kind of money* in which the funds referred to in his accounts were received and held by him. 2. As to the correctness of the decree of the probate court overruling the plea of tender, *as pleaded by the executor*. 3. As to the correctness of the decree of the probate court, ordering and directing the executor to pay the debt due to Magraw *in gold coin*.

Now, the defendant in error maintains that all these questions, *as they are presented by this record*, are questions of *local law*, which are not reviewable here, under the 25th section of the judiciary act.

In order to do so, it will be admitted that the record must show *some conflict* between the local law of California and the law of the United States, some question actually made between them in this case, and a decision by the State courts against the law of the United States.

In a case brought here from a State court, under the 25th section of the judiciary act, *the record* must show that some one of the matters mentioned in that section was necessarily decided by the court, *notwithstanding there may be a certificate from the presiding judge that such matters were drawn in question*. If it appears from the record that the State court *might* have decided the case on some other ground, this court has no jurisdiction. (Railroad Company *vs.* Rock, 4 Wallace U. S. R., 177.)

When the record shows that the State court might have disposed of the case, and, for aught that appears, did decide it, without deciding any question under an act of Congress against the plaintiff in error, this court has no jurisdiction. (Ocean Ins. Co. *vs.* Polleys, 13 Peters U. S. R., 157.)

It is not sufficient that one of the questions mentioned in the 25th section of the judiciary act was involved in the case and might have been decided; *it must appear, either in terms or by necessary intendment, that it was decided*, and against the right claimed. (Coon *vs.* Gallagher, 15 Peters U. S. R., p. 18. Armstrong *vs.* Treasurer of Athens Co., 16 *ib.*, 285; Mills *vs.* Brown, *ib.*, 525.

When there is nothing on the record to bring the case under that section, *except a certificate* by the State court that "there is drawn in question the validity of the statutes of

Ohio," &c., without specifying what statutes, or enabling this court to judge whether a case for its jurisdiction exists, the writ of error must be dismissed. (Lawler *vs.* Walker, 14 Howard U. S. R., 149.)

But no such conflict existed, and no such question was made or decided in this case.

This fact is shown by extrinsic juridical evidence, as well as by the record itself.

In the case of Lick *vs.* Faulkner *et al.*, (25 Cal. Rep., p. 404, &c.,) decided before this case, at the July term, 1864, the question of the constitutionality of the legal-tender act of February 25, 1862, was raised in the supreme court of California, on a plea of tender of notes issued under it, and that court decided in favor of its constitutionality, and sustained the plea.

In that case, however, the question was properly raised, first, by a valid tender made *before* suit brought; and second, by a valid plea of tender, properly pleaded afterwards as a bar to the suit.

The defendants pleaded in the court below that *before* the commencement of that suit, they tendered to the plaintiff the amount due in United States notes, issued by virtue of the act of February 25, 1862, and that the plaintiff refused the same. Upon the commencement of the action, the defendants brought the notes into court, and deposited them in the clerk's office, ready to be delivered to plaintiff when he would accept them. Plaintiff demurred to the defense set up in the answer, and the court overruled the demurred The case was tried by the court. The court found the matters stated in the pleadings to be true, and gave judgment for the amount of the debt, and to defendants judgment for costs. (*Ibid.*, p. 405, 406.) The opinion of the supreme court was delivered by Mr. Justice Currey, affirming the judgment of the court below, and holding that the act of Congress was constitutional and the tender valid. (*Ibid.*, p. 434.) * *

The same doctrine was reaffirmed in the case of *Carpenter vs. Atherton*, *Ib.*, p. 567, &c., in a case where the facts were substantially the same.

On the argument of this case, however, in the supreme court of California, the counsel of the plaintiff in error began by saying: "We do not deem it our duty, under the views entertained by the executor, to present any argument on the great constitutional questions connected with the currency. *We shall assume all the acts of Congress and* [*of*] *the State Legislature to be constitutional.*" (Magraw *vs.* McGlynn, 26 Cal.

Rep., p. 422.) They then proceeded to argue all the questions before named *as questions of local law*, and the argument on both sides, as well as the opinion of the court, delivered by the same Mr. Justice Currey, (who had delivered the opinion of that court in the case of Lick *vs.* Faulkner and others,) shows that they were not regarded as questions of conflict of law between the State and the United States, but were argued and decided solely as questions of local law.

There is nothing in the record of this case in conflict with this view, as will appear from an examination of the questions involved. No such conflict of law having been pretended in the State courts, it is now alleged, as an afterthought, merely for purposes of delay.

I.

As to the first question before stated, it will not be denied that it is *entirely a question of local law*, with which this court has nothing to do. The probate court compelled the executor to state in what currency he held the funds of the estate. The supreme court of California has held that the power was rightfully exercised, and this court must assume that judgment to be correct.

II.

The second question was as to *the sufficiency* of the plea of tender, *as pleaded*. The probate court held it to be invalid; and that judgment was affirmed by the supreme court. This also, was a question of local law. Those judgments were right, whatever may have been the reasons given for them. If the *judgment* was right, it matters not if the reasons given for it were wrong.

1. The plea of tender was defective *in point of time*. It was *not made*, and could not have been made, consistently with the facts of the case, *prior to the commencement of proceedings by Magraw* in the probate court to compel a payment of his debt. His petition was filed January 4, 1864, and the order on the executor to account was made the same day. (Printed Record, pp. 7, 8.) The executor filed his account on the 11th of February, 1864. (*Ib.*, pp. 8, 9.) On the 29th of February, 1864, Magraw filed his opposition to the allowance of the executor's account. (*Ib.*, pp. 9, 10.) On the 8th of March, 1864, (the hearing having been continued to that day,) the executor for the first time filed his plea of tender—in which he alleges that the said note was and is made payable *at the*

Chemical Bank, New York, and "that he made a tender of the full amount then due to the said Magraw *at the Chemical Bank*, New York, on the day of A. D. 1864, in *lawful money* of the United States, and that the same was then and there refused by said Magraw;" and further, "that the said money now remains deposited at said Chemical Bank, subject to the order of said Magraw," &c. (*Ib.*, p. 10, 11.)

Inasmuch as *the date* of the alleged tender was left *blank*, except as to the year 1864, and as *only three* days of the year 1864 had expired when adverse proceedings were instituted by Magraw, it is morally certain that it was made, if made at all, between January 4, 1864, and March 8, 1864, the date of the plea. It was an *after-thought*, but unavailing.

"Every tender at common law, or which is given by statute, *must be made before the writ sued out.*"

"If a tender be in fact made before the bringing of the action, though by the test of the writ it may appear to have been afterwards, (as if tender in vacation, and test of preceding term,) *the exact time* when the writ was in fact issued may be shown in pleading, or sometimes given in evidence, contrary to the test. But if a bill be filed on the same day the tender is made, though subsequent thereto, it seems that the defendant can no way avail himself by pleading the prior tender, as there is no fraction of a day in law."

"Every requisite which is in a particular case necessary to the validity of a tender *must, in pleading such tender, be shown to have been complied with, else the plea is not good.*" (Jacobs's Law Dic.—Tender.) The plea, therefore, was defective in not showing *affirmatively* that the tender was made *prior* to January 4, 1865.

But a plea of a tender made *after* the day of payment of a bill of exchange, and *before suit brought*, is not good. (Hume *vs.* Peploe, 8 East. R., 168; Lord Ellenborough; Johnson *vs.* Clay, 7 Taunt. R., 487, and cases cited by court.) That, in substance, was the executor's plea in this case, and according to this authority, was bad, even if otherwise regular, in all respects.

If made *after* suit brought, even if the tender had been *made in gold* to Magraw in person, he had a right to refuse it, because he had then incurred expenses, &c., in the prosecution of the suit, and had become responsible for costs.

2. The tender was defective in *point of place.*

The impression intended to be conveyed by the plea was that the executor had made his tender to *Magraw in person*, at the Chemical Bank, in New York. But such was not the

fact. Magraw at that time, and also at the time the writ of error was sued out, resided in Lancaster, Pennsylvania, where the citation was addressed to him. (Printed Record, p. 2.) The truth is, that if any tender was ever made at all, it was *a mere formal tender*, made at the bank where the note had been made payable. But the executor had no more right to make a tender there than at any other place on the globe. It is true the note had originally been made payable at the Chemical Bank, New York; but it appears by an endorsement upon it, that on the 20th of April, 1859, before its maturity, and in anticipation of its non-payment when due, Welch, the endorser, "waived demand, protest, and all notice of non-payment." (*Ibid.*, p. 3, 5.) That ended the connection between the note and the Chemical Bank. The holder was not bound to present it there to found a right of action against the maker. (Story on Prom. Notes, 228, p. 292–'3, sec. 229; Story on Bills of Exchange, sec. 355, 356, and notes.) And the endorser, who had a right to have it presented there, had waived all such right or claim by an express waiver. If there was no obligation to present the note there for payment, the debtor, it is clear, had no right to make a tender there, after its maturity.

The note was not paid at maturity, as we know, and there is no evidence in the record to show that it ever was deposited for payment at the Chemical Bank; that it ever was presented for payment there, or protested for non-payment. On the contrary, the evidence all tends to show that it was not, and that that was the object in obtaining the waiver, in anticipation of its non-payment.

The deposit of "the lawful money," referred to in the plea at the Chemical Bank, might as well have been made at any other bank in the country. There is no evidence to show that Magraw had any knowledge of the deposit there, or that he received any notice of the fact. His first knowledge of it was derived from the plea itself.

3. The said plea was defective from *ambiguity* of statement.

As there are *two or more kinds of lawful money*, the plea was defective in not stating *what kind* of "lawful money" was tendered, as was done in the case of Lick *vs.* Faulkner and others. The plea in question may have been *intended* to be the same as in that case, but it was not technically drawn, as there is no allegation in it that notes issued under the act of February 25, 1862, were tendered to Magraw, and consequently the question sought to be made was not legally raised upon the record, and cannot be considered in this case.

4. The plea was defective, whether the tender was made *before* or *after* January 4, 1864, *because the money was not brought into court.*

"A mere *offer* to pay money is not, in legal strictness, a *tender;* and even if the tender was in itself *sufficient*, the defendant is not entitled to take advantage of it, *unless he pleads it* and *brings the money into court.*" (Sheredine *vs.* Gaul, 2 Dallas R., p. 191; 2 Kent's Com., p. 508–509; 3 Bouvier's Inst., No. 2436, p. 17, and cases cited. See also 1 Barr, Penn. Rep., 41; 6 Watt's R., 265.)

A tender *defectively* made or *defectively* pleaded does not stop interest or save costs. (6 Watt's R., 265; 52 Penn. Rep., 84, 85; 12 John. R., 276.)

"The effect of a tender, when *properly* made, is to defeat the plaintiff in a suit which he may *afterward* bring; when the plaintiff has a direct cause of action, the only effect of the tender and refusal is to expose the plaintiff to *the loss of interest and costs*, if *the defendant pleads the tender* and *brings the money into court.*" (3 Bouvier's Institutes, No. 2436, p. 17, and cases cited.)

Admitting, for the sake of the argument, that the tender had been made in gold coin, the probate court was justified, on each and all of these grounds, in overruling the answer of the executor, and the supreme court was right in affirming its decree on that point, because "in pleas and answers in equity there must be the same strictness and exactness as in pleas at law, if not in matters of form, at least in matters of substance." (Story's Equity Plead., §658, 865.) But whether they were or not, is an immaterial fact in this court, as they were decisions at common law, or in exposition of the local law of the State, which are not reviewable here.

This court, as an appellate tribunal, cannot reverse the decision of a State court, because that court may hold a contract to be void which this court might hold to be valid. (Railroad Co. *vs.* Rock, 4 Wallace's U. S. R., p. 181.)

The result of these decisions of the probate court was, that no question in regard to the validity of a tender made in legal-tender notes was before the court; that in obedience to its order, the executor amended his account and admitted "that the funds *received* and *disbursed* by him, as mentioned and set forth in his account, (Printed Record, p. 8, 9,) were *all* of the description and kind of money designated as *United States gold coin.*" (*Ib.*, p. 12, 13.) The effect of this was, as stated in the decree of the probate court, "that the amount of said money, thus *received*, was $281,013 42, which

said sum was received by said executor in United States gold coin, and not in any kind or description of money or currency *other* than United States gold coin; and that the amount of money *disbursed* by said executor, from the commencement of his administration of said estate to the 11th of February, 1864, was $222,048, [in gold coin,] leaving in the hands of the said executor, in United States gold coin, the sum of $59,965 36, to the credit of said estate." (Printed Record, p. 14.) Or to simplify the statement still more, the result was, that he had received all the assets of the estate in gold, and had paid all the creditors of the estate in gold, *except Magraw*, and had no other kind of money in his possession but gold coin. Upon this showing, the probate court ordered the executor to pay Magraw's debt in *like manner*, in gold coin—that is, *with the only kind of money then in his possession*. The question was, practically, whether *he* should *be placed on a footing of equality* with all the other creditors of the estate, or whether, in the settlement of the estate, a *discrimination* should be made *against him alone*, without reason and without necessity. The court held that *equality* was equity, and the *legality* of that judgment, as a question of local law, is the only question now to be considered.

III.

It will be observed in the outset, that "the executor, *legatees, devisees, and all persons interested in the estate of the deceased*, were *brought into court to show cause*," &c., on the application of Magraw. (Printed record, p. 8.)

It also appears by the record and the decree of the probate court, that *the devisees and legatees* mentioned in Broderick's will appeared in the case, by R. S. Harrison, Esq., their attorney, *and made no objection or exception to the decree directing the payment of Magraw's debt in gold coin*, (*Ib.*, pp. 12, 13;) and that the only exception to the decree was made by the executor. (*Ib.*, p. 15.)

Both as to them and as to Magraw, the executor was merely a trustee, holding a fiduciary relation to both. (Hill on Trustees, Introd., marg. page 41.) In the Virginia Code of 1850, executors and "personal representatives," *i. e.*, administrators, are expressly named as belonging to the class of fiduciaries. (2 Lomax on Executors, p. 512, &c.) If the legatees and devisees id not object, and did not claim the advantage to arise from any difference in value between legal-tender notes and gold coin, the executor, as such, *in his*

own behalf, certainly could not do so. As to him, the decree was simply an order to pay Magraw's debt in the same kind of money that he had paid all the other creditors, and to pay the debt in the only kind of money which he had. It cannot, certainly, be illegal to command a trustee to apply in payment of debts the very money which he holds in trust for that purpose.

The argument on this branch of the case is ably stated in the following extracts from the opinion of the supreme court of California, showing that, conceding the constitutionality of the legal-tender law, it was still competent for the probate court to render the judgment which it did, on grounds of local law.

"An executor holds the property of his testator *in trust for the payment of debts* and legacies, and for the application of the surplus according to the will of the testator. He has only a qualified property in the assets of the estate of the testator, under a trust to apply the same to the payment of the testator's debts, and such other purposes as he ought to fulfill in the course of his office as executor. (Fair *vs.* Newman, 4 Term R., 645; Tiffany and Bullard on Trusts and Trustees, 483.) *By the statute of this State an executor is not permitted to make profit by the increase*, nor to suffer loss by the decrease or destruction, of any part of the estate, without his fault. (Probate Act, section 217.) *The money collected by the executor*, upon the sale of the property of the estate of the testator, *was received and held by him in a fiduciary capacity, for the use of the creditors of the estate* and others interested therein as beneficiaries under the will, and it was his duty to retain in his hands the money thus received until it could be applied and distributed in the order and mode provided by the law.

"The executor was required to render *a full account* of his administration, and *the authority of the probate court to enforce obedience to such an order is not doubted.* (Probate Act, sections 227, 228.) *The account* which an executor or administrator is required to render in such a case *must*, among other things, *show what is the amount of money in his hands* belonging to the estate, and if it be a matter of interest to those beneficially concerned, *we deem it competent for the court to require a specification of the kind of money received;* for it is the money received by him on behalf of the estate which the creditors, legatees, and distributees, as the case may be, are entitled to have.

"By the act of allowance and approval the claim is placed among the acknowledged debts of the estate; *but before payment can be enforced it is necessary to obtain a decree of the probate court for that purpose;* and when such judgment or decree is made, *the executor must pay the creditor as directed.* (Probate Act, sections 243, 245.) *The decree so made is a judicial determination of the rights of the parties, and possesses all the elements of a final judgment.* (Estate of Martin E. Cook, 14 Cal., 130) This decree determines *the amount* to be paid. This amount is ascertained by reference to the money of the estate in the hands of the executor. If there be sufficient in his hands for the payment in full of the creditor's demand, or only enough to pay a proportionate dividend, the decree is made according to the truth of the case, *and the executor is required to make payment as directed by the decree, from the money of the estate in his hands, or presumed to be there. In this case the money in the hands of the executor was gold coin of the United States,* and the decree requires this kind of money to be paid to the creditor. This decree is in consonance with justice, and in our judgment is *authorized by the law of the land.*

"*If there was any doubt as to the power of the probate court, under the law as it exists, independently of the act of* 1863, called the 'special contract law,' (Laws 1863, page 687,) *then that act,* as it seems to us, *has relieved the subject of all embarrassment.* The second section of the act referred to provides that '*in an action against any person for the recovery of money received by such person in a fiduciary capacity,* or to the use of another, *judgment for the plaintiff,* whether the same be by default or after verdict, *may be made payable in the same kind of money or currency so received by such person.*' The next section provides for enforcing by execution the payment of the judgment according to its terms.

"By the 245th section of the probate act, it is enacted that 'whenever a decree shall be made by the probate court for the payment of creditors, *the executor or administrator shall be personally liable to each creditor* for his claim of the dividend thereon, and execution may be issued on such decree, as upon a judgment in the district court, in favor of each creditor, and the same proceedings may be had, and such execution as if it had been issued from the district court.'

"*The proceedings instituted by* the plaintiff, as a creditor of the estate of the deceased, *against the executor, was in the nature of an action for the recovery of the money which he had in his hands in a fiduciary capacity,* and to which the plaintiff was entitled to the extent of his demand. The decree made upon

the issue joined between the parties was a judgment against the appellant as the executor of the estate, *and in order to render it at once effectual against him individually* the statute has declared that he shall be *personally liable* for the payment decreed to be made.

"The conclusion to which we come is, that the appellant, as *the executor of the last will* and testament of the deceased, *received the money of the estate collected by him in a fiduciary capacity*, and *as the trustee for the creditors*, and for the legatees or distributees under the will, and the same held in his possession, to be paid out and distributed under the direction of the probate court, in the mode provided and required by the law, and that the proceedings had in the probate court to that end were in accordance with the law in its letter and spirit."

Such were the reasons actually given by the supreme court of California for affirming the judgment of the probate court. They show that the question now attempted to be made here was not presented nor considered by that court; that its decision turned exclusively upon the construction of the local law—the question of the *validity* of the statutes of California, thus expounded by the court, not having been raised or decided. It is too late now to attempt to raise and argue for the first time the constitutionality of the specific contract law of California, so far as it applies to this case. It was not argued in the court below, because, as before stated, *its constitutionality* was then and there admitted. (McGlynn *vs.* Magraw, Cal. Rep., p. 422.) I therefore decline going into any argument here on the subject; although, if it were necessary, it would be perfectly easy to demonstrate its constitutionality, on the ground of the legality of contracts for the delivery of specific articles, and of the right of States to enforce the specific performance of contracts and trusts. If a party may bind himself to deliver *flour*, why not *gold?* If a party receives gold in trust, he may be made to pay gold under the trust. But it is unnecessary here to go into the argument.

Now, it is well settled that, when a case is decided by a State court, not upon the *validity*, but upon the *construction* of a State law, this court has no appellate jurisdiction. (11 Peters U. S. R., p. 167; 5 Howard U. S. R., p. 517; 12 *Ib.*, p. 165; 19 *Ib.*, 378; 2 Black's U. S. R., 574.)

But it is argued that the question of jurisdiction in this case has already been decided by this court.

It is true that on a preliminary motion to dismiss this writ

of error this court *refused* to dismiss the writ of error. But such refusal is *not final and conclusive* of the question of jurisdiction.

In the case of *Semple vs. Hagar*, (4 Wallace U. S. R., 432, 433,) Mr. Justice Grier thus expounded the law on this subject: "In all cases of a motion to dismiss the writ of error for want of jurisdiction, the court must necessarily examine the record to find the questions decided by the State court. But in many cases the question of jurisdiction is so involved with the other questions decided in the case that this court cannot eliminate it without the examination af a voluminous record *and passing on the whole merits of the case.* In such instances the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits."

In the late case of *Sparrow vs. Strong*, on a motion to dismiss for want of jurisdiction, the motion was overruled. (3 Wallace U. S. R.,, 105.) But, after argument on the merits and a full consideration of the case, the writ was dismissed for want of jurisdiction. (4 Wallace, U. S. R., p. 598.)

So in this case, I insist, that, on fuller consideration, the writ of error must be dismissed for want of jurisdiction.

IV.

But if this court has jurisdiction, then there is another ground on which the judgment in this case may be sustained, which is perfectly simple and conclusive, and clear of all embarrassment arising out of the legal-tender law.

After the answer of the executor, the probate court, by virtue of its authority in the settlement of the estates of decedents, might have ordered the executor to pay into court the balance of the money reported as remaining in his hands, consisting of gold coin, and then, having possession of the gold coin, it might have ordered the debt of Magraw to be paid out of the gold coin thus in court.

This position is abundantly fortified by authority.

"According to the present practice in England, the court will, immediately upon the coming in of the answer of an executor or administrator, order so much as he admits to have in his hands of the property of the deceased, and after all deductions or claims against the estate, to be paid into court; though it was formerly thought necessary for the plaintiff to show that the executor or administrator had abused his trust, or that the fund was in danger from his insolvent circumstances. The same order may be obtained

when the executor or administrator admits a balance in his hands in his examination or on the master's report. An executor who had admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was pending against him for a debt to a considerable amount due from the testator, but with liberty, in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. There having been a recovery in the action, the court ordered the amount to be paid out to the plaintiff in the action, and not to the executor. If an executor admits that all the testator's debts, &c., have been paid, the court will order the income of a balance paid by the executor to be paid to the person entitled to the residue." (2 Lomax on Executors, marg. p. 592, and cases there cited.)

Now if it could have ordered the gold coin into court and out of it have directed the payment of Magraw's debt, it could equally order the executor directly to pay it out of the gold coin in his hands, because it was as much under its control there as if it had been in court.

The executor is an officer of the law, and, as, such, he is bound to obey the orders of the probate court. In like manner, a sheriff may be ordered to bring the money which he has collected into court. If he has received it in gold, and has so reported to the court, he must bring it into court when ordered to do so; and, it being there, the court may order it, as gold coin in court, to be paid over to the creditor. That is just what was done in this case; nothing more and nothing less.

The question relates to the power of the court over the disposal of a *specific fund* of which it has the control, and this simple view disposes of all the sophistry in this case about the right of the executor to pay debts in legal-tender notes, &c.

A trust fund, in one aspect of it, is, without doubt, as is argued by plaintiff in error, a debt due by the trustee; but it is *that and something more*. It is the *specific difference* which constisutes it a *trust fund*, which contradistinguishes it from all ordinary debts, and gives to creditors their increased rights and to courts their increased powers over it.

It is idle to pretend that a *trustee*, acting under the direction of a court in the settlement of the estate of a decedent, occupies only the relation of a *common debtor*, and that his rights and duties are to be measured by that standard only; that he is to be treated as *an ordinary debtor*, and that he has

the right under the legal-tender law to substitute, against the orders of the court or the rights of the beneficiaries of the trust, legal-tender notes for a specific fund in gold, held by him as the property of the trust.

That law relates to common and ordinary *debts*, and nothing more. It does not apply to *trusts*, or to the action of courts in their control and disposition of trust funds. To hold otherwise would destroy all trust and confidence between man and man, and hold out a premium to fraud and villainy, without the slightest legal necessity under the legal-tender law.

The *express* exception in the statute relates to transactions with the United States. The *implied* exception in favor of trusts and fiduciary relations, arises *ex vi termini*, *by way of definition*, in being applicable only to the case of *ordinary debts*. Trusts and specific funds, held under the direction of courts for specific purposes in the administration of justice, are excluded and excepted out of the operation of the statute by the fact that they are not merely debts, but something more, which, *ex necessitate rei*, make them exceptions, as not being included within the purview of the statute.

On these grounds, I claim that the judgment of the court below shall be affirmed, with an allowance of *damages* for delay, under the rules of the court.

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